IN THE COURT OF APPEAL

AT KAMPALA

(Coram: Musoke, P., Lubogo, V-P., Nyamuchoncho,J.A, J.A.

BETWEEN

ROBERT KITARIKO……. APPLICANT

AND

DAVID TWINO – KATAMA…….RESPONDENT

(Application from the order of the High Court, of Uganda at Kabale (Mr. Justice Oteng) dated 4/11/81in Election Petition MKA No.2 of 1981)

RULING OF THE COURT

On November 4, 1981, at the trial of an election petition, the election judge ordered the list of objections struck out, then. The respondent then applied for and was granted leave to appeal. On November l1, 1981, he filed the Notice of Appeal. Since then he has taken no further step to prosecute the appeal. This application seeks, threfore1.,;to strike out that Notice of Appeal on the grounds that:-

(a) no appeal lies; or

(b) alternatively, if such appeal lies, it has not been instituted within the 60 days of the date when the Notice of Appeal was filed.

In arguing the first ground, Dr. Byamugisha, counsel for the applicant, submitted that this court has no jurisdiction to hear an appeal from an order made in an election petition as such appeal is precluded by S.66 of the National Assembly (Elections) Act, and article 51 of the Constitution. He submitted further that an order mad in an election petition is not appealable under S. 77, 78 and 79 of the Civil Procedure Act. He referred us to a number of authorities

which we need not reproduce here as we think they are not relevant for the determination of this ground.

Counsel for the Returning Officer adopted in toto the submissions Dr, Byamugiaha.
Mr. Obol – Ochola, counsel for the respondent, submitted that an appeal lies to this court so long as the order is not a final decision of the election court disposing of the petition. It is only the final order which is not appealable under s.66 of the National Assembly Election Act. He submitted that the appellant was dissatisfied with the trial judge's ruling regarding the interpretation of r.11 of the Election Petitions Directions which ruling, he said, was an interlocutory order on a matter of procedure. Such ruling, he said, is appealable by virtue of s.68 of the Civil Procedure Act and O. 40 1 (2) of the Civil procedure Rules. He said that the issues raised by the appeal are very intricate and important legal points which require authoritative ruling of this court.

Article 51 of the Constitution confers jurisdiction on the High Court to hear election petitions to determine the question whether:

(a) any person has been validly elected as a member of the National Assembly and

(b) whether the seat of any member has become vacant.

The determination of these questions by the High Court (election Court) are not subject to appeal by virtue of article 51 (3) of the Constitution. Section 66 of the National Assembly (Elections) Act ct that at the conclusion of the trial of an election petition the court shall determine whether the elected member of the National Assembly whose ..... election is complained of..... .. was duly..... elected. Thus, repeating more or less what Article 51 of the Constitution says. The section then directs the election judge to certify the result of the trial to the Electoral Commission and that upon such certificate being given such determination shall be final.
This section clearly deals with the final results of the petition.
Under r.22 of the Election Petitions Directions, the trial of an election petition follows as

nearly as possible the trial of a suit and is governed by the provisions of the Civil Procedure Act and the Rules. The Directions were made by the Chief Justice under the enabling s. 71 of the National Assembly (Elections) Act. By the enabling power, he applied, to the trial of petitions, the provisions of the Civil Procedure Act and the rules made there-under. This application clearly makes the trial of an election petition subject to all incidents of the Civil Procedure Act and Rules. That is how S.68 of the Act comes in.

The question whether the court of appeal has jurisdiction to hear an interlocutory order made by an Election Court in an election petition has been considered in a number of cases in East Africa and other Commonwealth countries. In East Africa the latest case is Mudavadi v. Kibisu (1070) E.A. 585. That was an appeal from an interlocutory ruling of the Election Court sitting as a division of the High Court of Kenya. No point was taken by the parties as to the jurisdictions of the Court of Appeal to hear the appeal. The judges, however, asked the advocates to address them on the matter. Both counsel (for the appellant and for the Attorney General) agreed that the court did have jurisdiction. The court of Appeal after considering s.44 of the Constitution of Kenya (which is similar to Article 51 of our constitution) and s.66 and 75 of the Kenya Civil Procedure Ordinance (similar to our s.68 and 78 of the Civil Procedure Act and O.40 of the Civil Procedure Rules) held that the court of appeal has jurisdiction to hear an appeal from an order of the High Court which did not determine the validity of the election.

The second case comes from Malaysia, it is the case of C.Devan Nair V. Yong Kuan Teik (1967) 2 A.C. 31.
In that case the appellant was the successful candidate in the election held on April 25, l964. The result of this duly published in the Gazette on July 11, 1964. On July 28, 1964, within the required 2l days, the respondent presented to the Registrar of the Supreme Court an election petition claiming that the appellant's election was invalid on the ground that he was disqualified in that he was not at the time a citizen of Malaysia. The appellant not having appointed a solicitor or advocate or left an address for service, the respondent acting under r.10, lodged a copy of his petition on the registrar on the last day of service prescribed by r.l5. He further advertised a notice of presentation of the petition in the gazette on July 23, 1964, after the 10 day period required by r.15. The election judge, struck out the petition on the ground that it had not been served in accordance with rules and on the basis that that order was interlocutory gave leave to appeal The Federal Court of Appeal set aside his decision,

giving leave to appeal to the Privy Council it was there held that:

> "On the basis that the order the election judge was interlocutory and on the true construction of s.33 of the Election Offences Ordinance, that section, which contained no such limiting words as those in, s.36 was insufficient to
> overcome the express words of s.67 of the Courts of Judicature Act, 1964, so as to preclude the bringing of an appeal in an interlocutory matter, so that it was open to the election judge to give leave to appeal and the Federal Court to entertain the appeal……."

Section 33 referred to in this case corresponds with article 31 of the constitution; s.36 is similar to s.66 of the National Assembly (Elections) Act. Section 67 upon which the decision of the Privy Council hangs, reads;

> "The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter; whether made in the Exercise of its original or of its appellate jurisdiction subject nevertheless to the provisions of this or any other law regulating the terms and conditions upon which such appeal shall be brought."

The gist of this section is more or less contained in s.68 of the Civil Procedure Act it reads:-

> "Unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of decrees and from the orders c the High Court to the Court of Appeal."

These authorities, with which we respectfully agree, do Show that an interlocutory order made by an election judge in an election petition is appealable with the leave of the court by Virtue of ss.68 and 77 of the Civil Procedure Act and O.40 1 (2), and we so hold. It follows therefore, that this first ground fails.

The second ground advanced by counsel for striking out Notice of Appeal is that he appeal has not been instituted within 60 days of the date when the notice of appeal was lodged. In addition to this argument counsel submitted that the respondent is not entitled to rely on the proviso to sub-rule (1) of r.81, of the Rules of this court (which excludes from the computation of the time within which to institute the appeal the time taken by the registry to prepare the copy of the proceedings) because advocates for the appellant had not sent them a COPY, of the application for the copy of the proceedings to the Registrar of the High Court as required by this rule.

Mr. Obol - Ochola submitted that after filing the of appeal he applied in writing for a copy of the proceedings to the Registrar on 12th March, 1982, but he said, up to now they have not received the copy of the proceedings. In the circumstance they could not file the memorandum of appeal without that copy. They are still waiting for it. We understand by this argument that he would file the appeal as soon as he gets it. He argued further that it would have been pre-mature to ask the Registrar to issue a certificate at this moment under the proviso to r.81 (1). He also relied on S.61 and S.80 (2) *o*f the Civil Procedure Act (cap 65). But, he did not say whether or not he sent the copy of the proceedings to the applicant's advocates.

As rightly pointed out by Dr. Byamugisha, r.61applies to criminal appeals and review only. It does not apply to this case. Section 80 (2) relied on by Mr. Obol Ochola does not apply to institution of appeals in the Court of Appeal; such institution is governed by r.81. This leaves only r.81 to consider. Rule 81 regulates the time within which to institute appeals. It stipulates that an appeal should be filed within days after filing the
Notice of Appeal. This period could however be extended if the COPY of the proceedings is asked for 30 days from the date of the decision to appealed from. The order it is desired to appeal against was made on 4th November 1981, accordingly, the application for a copy of proceedings should have been lodged not later than 5th December, 1981, but the application was made according to the affidavit of Mr. Obol - Ochola, on 12th March, 1982. It was many days out of time. Mr. Obol - Ochola has conceded that it was out of time and did not even attempt to give an explanation as to why the application was not made within the time permitted by the rule. It is also admitted that no copy was given to the other party. In this way

the rules of court have
not been followed.

In Ratnam v. Cumarasamy (1964) 3 All. E.R. 933. Lord Guest expressed his opinion concerning rules of court in the following words:-

> "The rules of court must prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation."

In this case the rules o courts and in particular r.81 have not been obeyed. The appeal has not been instituted within 60 days of the date when the notice appeal was lodged as required by r.81 (1). The Copy of The proceedings was not applied for within 30 days of the date of the decision against which it is desired to appeal as required by the proviso to r.81 (l). And thirdly, a copy of the app1ictipn for a copy of the proceedings was not sent to the applicant's advocates as required by r.81 (2); accordingly the appellant is not untitled to rely on the proviso to r.81 (1) to have excluded such time as maybe certified by the registrar to have been required for the preparation and delivery to the appellant of the copy of the proceedings. The effect of those defaults is that they attract the application of r 82 which provides that where a party who lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal. It therefore, that from the last day on which the appeal could have been properly instituted within the 60 days period permitted by r.81, (without relying on he proviso to r.8l (1)) the notice of appeal is deemed to have been withdrawn and at the moment no valid notice of appeal is legally on the record. The application for the copy of proceedings made on 12th March, 1982, which application was out of time, cannot revive the notice of appea1 nor would the supply of the copy of the proceedings be of any use o the appellant as o now he cannot legally file a memorandum of appeal.

In the circumstances and for the reasons given above the notice of appeal is struck out with costs to the appellant and the Returning Officer.

Dated at Kampala this 9th day of November 1982.

Signed: - S. Musoke
PRESIDENT

Signed: David L. K. Lubogo
VICE-PRESIDENT

Signed; P. Nyamuchoncho
JUSTICE OF APPEAL

Mr. Kasule & Dr. Byamugisha, Counsel for the Applicant.
Mr. Obol - Ochola, Counsel for the Respondent.
Mr. D. Byamugisha of the Attorney General for the Electoral Commission

I certify that this is a
true copy of the original.

M. Ogang
REGISTRAR .